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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

JAMES S. PATTESON, JR.,
Petitioner,

vs.

V. J. DEVINE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment entered in this cause on the 29th of March, 1957 and an order overruling a petition to rehear on the 30th day of April, 1957.

OPINIONS BELOW.

This case was not reported in the District Court and sufficient time has not elapsed for the opinions of the Court of Appeals to be reported.

We are appending the opinion of the District Judge, Marion S. Boyd, which was rendered when respondent's motion for a new trial and petitioner's motion for a judgment N. O. V. were each overruled.

This case was heard by Judges Allen, Stephens (9th Circuit), and Miller, Circuit Judges. The majority opinion by Judges Allen and Stephens was rendered on the 29th of March, 1957 and a dissent by Judge Shackleford Miller was filed on the same day. A petition to rehear was overruled by the majority, consisting of Allen and Stephens, with a dissent by Judge Miller. The opinions of the Court and of the dissenting Judge are appended.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1254.

QUESTIONS PRESENTED.

1. Does a Federal Appellate Court have authority under the Seventh Amendment to the United States Constitution to set aside a jury verdict for inadequacy in a common law action for malicious prosecution where there is no error of law, all facts in support of the verdict being disputed, and the District Judge in the exercise of his discretion having approved the verdict?

2. May a Federal Appellate Court set aside a jury verdict and judgment rendered thereon in a common law action for malicious prosecution for inadequacy of com-

pensatory damages and reverse for the assessment of compensatory damages only, and affirm the same verdict and judgment as to liability and punitive damages where the verdict was entire, was based upon conflicting evidence, was not affected by any error of law, and a motion for a new trial was overruled by the Trial Court?

3. May a Federal Appellate Court set aside a jury verdict and judgment for compensatory damages because of inadequacy alone where applicable state law authorizes the jury to mitigate damages in accordance with the facts and circumstances of the case?

4. Does an indictment by a Federal Grand Jury show probable cause as a matter of law in a malicious prosecution case where there is no evidence that the indictment was based upon false swearing, concealment of facts or other improper conduct of the party sought to be charged?

CONSTITUTIONAL PROVISION INVOLVED.

This case involves a violation of the Seventh Amendment to the Constitution, which is as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE.

The respondent, plaintiff below, brought a common law action for malicious prosecution against the petitioner, the defendant below, which arose under Tennessee law.

Jurisdiction was based on diversity of citizenship and the amount in controversy exceeding $3,000.00.

Respondent was indicted by the Federal Grand Jury for use of the mails in interstate transportation and use of instruments of transportation and communication in interstate commerce in an alleged conspiracy to defraud petitioner and others in violation of Title 18 U. S. C., Sec. 371, Sec. 1341, and 15 U. S. C., Secs. 77q (a), (1) and 77c (a).

Respondent was tried and acquitted.

Petitioner made the original complaint to the United States District Attorney, testified before the Grand Jury, and testified upon the trial of the criminal case.

After Respondent was acquitted this action was filed for malicious prosecution. The respondent alleged in his complaint the facts above stated and that petitioner "maliciously, intentionally and without just cause" stated to the United States District Attorney that respondent had violated certain laws of the United States and thereafter testified to such statements before the Grand Jury (3b through 5b). There was no allegation that the petitioner testified falsely before the Grand Jury, procured false testimony through others, withheld material evidence or was guilty of any fraud or improper contrivance in obtaining the indictment.

Petitioner's answer put in issue every material allegation of the complaint (6b, 7b).

Petitioner then pled specially that probable cause existed in the case (7b through 9b), and that he acted on the advice of the United States District Attorney and representatives of the Federal Bureau of Investigation and Securities and Exchange Commission (10b).

Respondent testified that he and his associate, Snakard, representing themselves and associates called the Devine group, met petitioner and others at Brownwood, Texas, and showed them certain oil leases and oil and gas wells that they claimed to own together with a gasoline plant at

Salem, Illinois (11b through 14b). This showing resulted in a preliminary agreement to organize a joint venture known as Padre Petroleum Company (Exhibit 3, 128b through 130b).

The understanding was that respondent and his associates would furnish the gasoline plant, then located at Salem, Illinois, and the oil and gas leases in Texas and that petitioner and his group would contribute cash which would be used for transporting and re-erecting the gasoline plant in Texas and developing the leases for the joint benefit of both groups (16b and 17b). This preliminary agreement was made on December 4, 1950 (20b).

Thereafter a formal contract was prepared under direction of respondent and William F. Snakard (Exhibit 4, 131b). On December 18, 1950, respondent and William F. Snakard left Kansas City, Missouri, with the formal contract in their possession for the purpose of circulating it among the prospective joint adventurers for signatures and for the collection of the cash to be contributed by petitioner and his group (20b). Respondent and Snakard for this purpose travelled to St. Louis, Missouri (21b), Memphis, Tennessee (23b), and Earle, Arkansas (23b). They collected on this trip checks representing $67,500 (22b through 25b).

From the cross-examination of the respondent, it was shown that respondent and his associate Snakard went to Evansville, Indiana, on December 19, 1950, to attempt to purchase the gasoline plant which they had represented that they owned and had agreed to furnish to the joint venture and trusteeship (26b). Respondent was to pay $50,000 for the plant which was to be discharged by paying $15,000 in cash and executing a $35,000 mortgage (32b). Snakard gave a $15,000 check as the down payment, which was dishonored for insufficient funds (37b, 38b, 39b). Another check was given on the trust funds

by Snakard which was not accepted by the owner of the plant because it had been sold to others (38a through 40a). On January 6, 1951, respondent learned that the gasoline plant had been sold to others and that he and his group could not possibly acquire it and comply with the agreement by furnishing it to the joint venture (43b). Respondent testified that he did not notify petitioner, and his group, of the failure to acquire the plant but permitted his associate Snakard as Trustee to continue to disburse the funds of the joint venture (44b, 45b).

Respondent testified that in February, 1951, he took two checks totalling $8,000, drawn by William F. Snakard as Trustee on the trust funds, and went to Webb City, Missouri, to purchase certain leases from a Dr. Greggory (50b). Respondent admitted that he and his group had agreed to contribute these leases to the joint venture (60b and 61b). Respondent and his group contracted to furnish certain leases known as the United North and South Leases (63b). In spite of this contract, trust funds to the extent of $13,500 were used to purchase these leases by checks drawn by William F. Snakard as Trustee (65b, 67b). Respondent concealed that this was an illegal and wrongful act (69b, 70b).

On January 17, 1951 Snakard as Trustee paid respondent $1,000 by check drawn on trust funds reportedly covering the dismantling of the gasoline plant at Salem, Illinois, which respondent and his group had agreed to furnish but had never owned (72b). Although this check was endorsed and cashed by respondent, he denied any knowledge of it in response to an interrogatory propounded under Rule 31 (76b). Other instances of the misappropriation of funds were shown in the evidence during the months of January and February of 1951.

In analyzing this evidence the Court of Appeals stated: "The evidence in the instant case was in conflict upon the

principal claims of misrepresentation. We do not discuss them because the jury found for plaintiff and necessarily found that the misrepresentations alleged had not been made and the fraudulent acts charged had not been performed."

There was evidence that the fraud of respondent and his associate was discovered in March, 1951, with the result that respondent and his group turned over a twenty-nine per cent interest in the joint venture to petitioner and his group; and that in July, 1951 petitioner threatened Snakard with arrest and prosecution for fraud unless an additional fifteen per cent of the joint venture was surrendered by the Devine group.

Petitioner reported the matter to the United States District Attorney at Memphis in late 1953. A conference was held between petitioner, the District Attorney, F. B. I. agents and others prior to the indictment (99b). Following this conference, a post office inspector and a representative of the Securities and Exchange Commission, investigated the matter in Earle, Arkansas, Memphis, Tennessee, Fort Worth, Brownwood, and Dallas, Texas, and interviewed twenty-five or thirty persons (104b). These investigators of governmental agencies reviewed the Padre Petroleum Company records (105b). They interviewed Dr. Devine and many others. (106b).

After the investigation, a conference was held with several of the Assistant United States District Attorneys at Memphis, Tennessee, to review the results of the investigation (116b). The matter was then presented to the Grand Jury. Ten witnesses testified and the indictment was returned (117b).

Petitioner moved for a directed verdict on the ground that the indictment itself constituted prima facie evidence of probable cause and there was no evidence that it was

obtained by any improper conduct (Record 159b through 162b). This motion was overruled.

Respondent testified that he was a physician and surgeon (7a). He stated that after the indictment was returned against him he employed these lawyers: Mr. John S. Marley of Kansas City, Missouri, and paid him $450 (8a, 9a); Mr. Lewis Donleson of Memphis, Tennessee, and paid him a $200 fee (10a); Mr. Carl Rizley of Sayre, Oklahoma, and paid him a $5,000 fee (12a); the firm of Wilkes & Haynes of Memphis, Tennessee, and paid them a $9,500 fee (12a); and Mr. Robert M. Murray of Kansas City, Missouri, and paid him a $3,000 fee. (12a, 13a). Respondent's testimony was the only evidence as to these fees. There was no evidence that the fees were reasonable.

All issues were submitted to the jury under a charge which was unexcepted to. After requesting additional instructions as to liability, the jury returned a verdict for the respondent for $500 compensatory damages and $1.00 punitive damages, and judgment thereon was entered (163b).

Respondent moved for a new trial. The only ground necessary to notice here is that the verdict in the amount of $500 compensatory damages is so wholly insufficient and inadequate as to show the jury failed and neglected to consider the elements of damage shown by the undisputed evidence offered by plaintiff and that the verdict was the result of passion, prejudice, partiality and compromise on the part of the jury. (22a through 24a). It was not claimed that there was any error committed in the admission or rejection of evidence, the charge of the Court, or in connection with any other matter which occurred during the course of the trial.

Petitioner moved for a judgment notwithstanding the verdict of the jury based upon his motion for a directed verdict (24a through 27a).

The trial court overruled both motions, saying:

"The Court: I say if this is a discretionary matter for the Court, the Court exercises its discretion in overruling the motion. Generally speaking, the Court has some discretion in dealing with motions for new trial, and you have put this up to the Court as being a matter under which there is a positive obligation on the Court——.

Mr. Murray: As a matter of law there is.

The Court: As a matter of law——

Mr. Murray: Yes, sir.

The Court: ——to grant you a new trial. And I am simply saying that as a matter of law you are not entitled to the relief you seek here, nor are you entitled to have the Court in its discretion grant a new trial.

Mr. Murray: Then the result of it is both motions are overruled, then.

The Court: Well, with respect to Mr. Porter's motion, the Court thinks the case was properly submitted to the jury, and that it was a question for the jury, and the jury's verdict settled the matter" (Record 168b).

Both parties appealed.

OPINION OF THE COURT OF APPEALS.

The majority of the Court of Appeals held that there was evidence to sustain liability and that petitioner's motion for a directed verdict was properly overruled. In arriving at the conclusion that the respondent had carried the burden resting upon him of showing an absence of probable cause, the Court inferred an absence of probable cause from evidence of malice. The majority then reasoned, after an examination of the facts, that "since the verdict was less than the amount of the loss shown

and not disputed, the motion for a new trial should have been granted." The majority did not disturb the verdict for punitive damages of $1.00, holding that the amount of punitive damages was within the discretion of the jury. The majority then found that the issues of liability, compensatory damages and punitive damages were separable, ordered a reversal of the case for assessment of compensatory damages only and permitted the verdict to stand as to punitive damages and liability.

Circuit Judge Miller dissented, saying:

> "It seems clear to me that this was a compromise verdict, that most of the jurors in this case were not in favor of returning a verdict for the plaintiff, and would not have agreed to a verdict for the plaintiff if it would result in awarding to him any substantial amount. . . . In the present case it is at least probable that the questions of liability and the amount of damages were, as a practical matter, so closely interwoven that if a new trial is to be granted, it should be granted in its entirety and not limited to the question of damages only."

A petition to rehear was filed citing applicable Tennessee authorities to the effect that proof of malice of the most express character would not authorize the Court to infer an absence of probable cause, and citing Tennessee authorities which held that in a case of this nature all of the circumstances may be shown in mitigation of damages and that the jury may mitigate the damages in accordance with these circumstances.

The following order was filed and entered on this petition to rehear:

> "The petition for rehearing is denied. Judge Miller is of the opinion that the petition should be granted."

ARGUMENT.

I.

The Courts of Appeals Are in Conflict as to Their Right to Review a Jury Verdict and Judgment for Excessiveness or Inadequacy.

This was a common law action for malicious prosecution and the burden of proof was on the respondent, plaintiff below; to make out his case by a preponderance of the evidence on every material issue. The recognized conflicts in the evidence gave the jury the right to believe either all, a portion, or none of the respondent's evidence either as to liability or damages. The risk of non-persuasion resting upon respondent applied equally to liability and to the damages sustained.

The evidence of the respondent was conflicting and was so found by the Court of Appeals. The Court reasoned, however, that, since respondent's testimony as to expenses incurred was not contradicted by direct testimony bearing on these expenses, these facts appeared as a matter of law and that the jury was bound to accept and to include this evidence of expense if any verdict was returned for respondent.

In **Morgan v. Tenn. Central Ry. Co.**, 31 Tenn. App. 409, 422-423, 216 S. W. 2d 32, 37-38 (1948), the rule applicable to this situation is stated:

> "If a witness is discredited by the jury on one material issue about which there is a conflict in the testimony, it is within the province of the jury to discredit the witness on any or all other material issues in the case, although there is no conflict in the evidence as to such other issues. The rule is based upon the maxim, 'false in one, false in all'; and upon the

fundamental principle of evidence that the jury must determine the credibility of witnesses, not the judge. Frank v. Wright, 140 Tenn. 535, 205 S. W. 434; Wright v. Bridges, 16 Tenn. App. 576, 65 S. W. (2d) 265.

"We think this rule should be further extended so as to protect the constitutional right of trial by jury. We hold the correct rule to be: Several facts must be proved by a plaintiff to make out his case. He relies upon the testimony of one witness to prove the facts. That witness is contradicted by the evidence on one material issue, but is not contradicted on the other issues. The trial judge has no constitutional right to state to the jury that other facts about which there is no contradictory evidence are proved. Frank v. Wright, supra; Wright v. Bridges, supra; Ivey v. Hodges, 23 Tenn. 154, 155; Brenizer v. Nashville C. & St. L. Ry., 156 Tenn. 479, 3 S. W. (2d) 1053, 8 S. W. (2d) 1099; Haskins v. Howard, 159 Tenn. 86, 97, 16 S. W. (2d) 20; Osborn et al. v. City of Nashville, 182 Tenn. 197, 201, 185 S. W. (2d) 510, 512."

The Federal cases are to the same effect.

Norfolk & Western RR. Co. v. McKenzie, 116 F. 2d 632 (6th Cir.);

Victory Sparkler & Specialty Co. v. Latimer, 53 F. 2d 3 (8th Cir.).

In **Norfolk & Western R. Co. v. McKenzie**, supra, the Court stated the rule concisely:

"Under our judicial system the jury alone is charged with forming a conclusion as to the truth of the testimony offered." (Citing many cases.)

A new trial could not be granted on this record at common law as it existed at the time the Seventh Amendment was adopted.

In **Parsons v. Bedford, Breedlove & Robeson**, 28 U. S. 433, 7 L. Ed. 732, 737, this Court, after quoting the Seventh Amendment, said:

> "... This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. The Judiciary Act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (secs. 22, 24) to this court to redress errors of law; and, for such errors to award a new trial, in suits at law which have been tried by a jury."

In **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474, 77 L. Ed. 439, 443-444, this Court refused to set aside a judgment based upon a jury verdict for $1.00 which was admittedly less than the actual damages of the party. The Court said:

> "First. The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. Its early formulation by this Court was influenced by the mandate of the Judiciary Act of 1789, which provided in Sec. 29 that there should be

'no reversal in either (circuit or Supreme) court on such writ of error . . . for any error in fact.' Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court."

We question the right of any Federal Appellate Court to review any judgment based upon the verdict of the jury for inadequacy or excessiveness where there is no error of law appearing in the record as in the case at bar and do not believe that the decisions of this Court have recognized that right.

A conflict has arisen among the various circuits as to when a Federal Appellate Court should review a judgment based upon a jury verdict for inadequacy or excessiveness.

In the majority of the circuits the common law rule adhered to is that the granting or denial of a motion for a new trial for inadequacy or excessiveness of the verdict rests in the discretion of the Trial Court and in the Trial Court alone. Proceeding from this premise most circuits have not disturbed a judgment because of the excessiveness or inadequacy of a judgment unless the Trial Court has abused his discretion.

Taylor v. Virginia Metal Products Corp. (4th. Cir.), 204 F. 2d 457;

Atlanta Greyhound Corp. v. Lyon (4th Cir.), 107 F. 2d 157;

Rankin v. Shayne Bros., Inc., (Dist. of Col. Cir.), 234 F. 2d 35;

Hulett v. Brinson (Dist. of Col. Cir.), 229 F. 2d 22;

Miller v. Tenn. Gas Transmission Co. (5th Cir.), 220 F. 2d 434;

Marsh v. Illinois Central R. Co. (5th Cir.), 175 F. 2d 498;

Home Ins. Co. of New York v. Tydal Co. (5th Cir.), 157 F. 2d 851;

Smyth Sales Co. v. Petroleum Heat & Power Co. (3rd Cir.), 141 F. 2d 41.

In the 2nd Circuit this basis for reviewing jury verdicts has been repudiated and an entirely different rule adopted.

In **Miller v. Maryland Casualty Co.**, 40 F. 2d 463, 465, the 2nd Circuit in an opinion by Judge Learned Hand rejected the concept that Federal Appellate Courts can review a jury verdict where there has been "an abuse of discretion," and said:

> "... That is an impracticable rule, unless confined as it has always been confined save for Cobb v. Lepisto [6 F. (2) 128]. The trial judge decides what verdict is within the bounds of reasonable inference from the evidence. That is a question which we can consider as well as he, and which we do upon his direction of a verdict. But by hypothesis we are not to be allowed to do that; we must come at the matter at one remove, and apply the same test to the judge's decision that he applies to the jury's. We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements."

In that same opinion the Court catalogued the cases wherein appellate courts have granted new trials for excessive or inadequate verdicts as follows:

1. Cases where the jury gave only nominal damages, that is, where they did not attempt to appraise the plaintiff's loss at all;

2. Cases where the jury's verdict was less than the amount of the loss which the defendant did not dispute;

3. Or cases where damages were not involved.

This classification was adopted and approved by the 6th Circuit in **Reisberg v. Walters**, 111 F. 2d 595. In that case plaintiff sued for personal injuries. The amount of special damages was stipulated and the jury returned a verdict for less than the stipulated amount. It was obvious that the plaintiff recovered nothing for pain and suffering. The Court held that the facts of the case brought it within the second classification above listed, and reversed the Trial Court for failure to grant a new trial and remanded the case. The Court quoted with approval from **Dimick v. Schiedt**, 293 U. S. 474, 486, 79 L. Ed. 603, 611, 95 A. L. R. 1150, as follows:

> "'Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages.'"

Therefore, two different rules are being applied by the various circuits in the review of judgments based upon jury verdicts where these judgments are claimed to be either inadequate or excessive. At present, if a person happens to be sued in the 2nd or 6th Circuit, the jury verdict against him would stand on appeal unless it happened to fall in one of the three categories listed in **Reisberg v. Walters**, supra. If, however, the same trial occurred in another circuit, the jury verdict would stand

unless the Appellate Court concluded that the Trial Court had abused his discretion in overruling a motion for a new trial.

If Federal Appellate Courts can review jury verdicts for inadequacy or excessiveness, then such right should be clearly defined and restricted so as to be circumscribed by the inhibition contained in the Seventh Amendment. This constitutional right should not mean one thing in one jurisdiction and something entirely different in another.

In spite of this conflict in the authorities, the jury verdict in the case at bar should not have been disturbed because **under either rule** this verdict was based upon conflicting evidence which the jury could believe or not in its discretion. Thereafter the Trial Judge expressly exercised his discretion and approved the verdict of the jury. Regardless of whether the abuse of discretion rule is applied or whether the categories of cases adopted by Judge Hand is applied, this jury verdict should not have been disturbed because this case does not come within either classification.

II.

The Court of Appeals Has Set Aside a Part of an Entire Jury Verdict and Judgment in Violation of the Seventh Amendment and Applicable Decisions of This Court.

It is recognized that modern authority permits an Appellate Court in proper cases to reverse and to remand for the assessment of damages only, but this has not been done in any reported case similar to the one at bar.

No claim is made that there was any error of law committed either in the admission or rejection of evidence, the charge of the Court or any other matter. Respondent's entire case rests on conflicting evidence. The Trial Court would have been in error had he charged the jury as a matter of law that the jury could not return a verdict for

the plaintiff in any amount less than $500. Yet the Court of Appeals has held that the jury verdict of $500 was erroneous as a matter of law because of its amount and has reversed for the assessment of damages only.

In **Gasoline Products Co., Petitioner, v. Champlin Refining Co., Respondent,** 283 U. S. 494, 500-501, 75 L. Ed. 1188, 1191, Mr. Justice Stone stated the rule with reference to the granting of a partial new trial, such as was granted in this case, to be:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. See Norfolk S. R. Co. v. Ferebee, 238 U. S. 269, 274, 59 L. ed. 1303, 1306, 35 S. Ct. 781; American Locomotive Co. v. Harris, 152 C. C. A. 221, 239 Fed. 234, 240; Simmons v. Fish, supra (210 Mass. 568, 97 N. E. 102, Ann. Cas. 1912D, 588); McBride v. Huckins, 76 N. H. 206, 213, 81 Atl. 528; General Motors Truck Co. v. Shepard Co., 47 R. I. 153, 156, 130 Atl. 593; Lefebvre v. Central Vermont R. Co., 97 Vt. 342, 358, 123 Atl. 211. Here the question of damages on the counter-claim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. See Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588. There should be a new trial of all the issues raised by the counter-claim."

Respondent's brief in the Court of Appeals states:

> "In conclusion we respectfully submit the evidence of plaintiff on the specific damage and attorneys' fees and traveling expenses was uncontradicted, the jury was properly instructed to allow plaintiff for such damage if they found in favor of plaintiff, the verdict is grossly inadequate and shows on its face that the

jury failed to follow the Court's instructions **and compromised liability and damages to prevent a disagreement** . . ." (Emphasis added.)

Judge Miller in his dissenting opinion in the case at bar said:

> "It seems clear to me that this was a compromise verdict, that most of the jurors in this case were not in favor of returning a verdict for the plaintiff, and would not have agreed to a verdict for the plaintiff if it would result in awarding to him any substantial amount. . . . In the present case it is at least probable that the questions of liability and the amount of damages were, as a practical matter, so closely interwoven that if a new trial is to be granted, it should be granted in its entirety and not limited to the question of damages only. Schuerholz v. Roach, 58 F. (2d) 32, 34, C. A. 4th, cert. denied, 287 U. S. 623; Southern Railway Co. v. Madden, 235 F. (2d) 198, 204, C. A. 4th. Unless it **clearly** appears that the issue of damages was distinct and separable from the issue of liability, a new trial on the issue of damages alone should not be granted. Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 404, 500; Thompson v. Camp, supra, 167 F. (2d) 733, 734, C. A. 6th." (p. 9.)

Both Judge Miller and respondent's counsel concluded this jury's verdict was a compromise in that damages were mitigated because of the doubtful liability.

In **Mutual Benefit Health & Accident Ass'n v. Thomas**, 123 F. (2d) 353, 356 (4th Cir.), the Court said:

> "If it should be conceded that the jury failed properly to respond to the question of damages, that part of its verdict could not be set aside unless it were certain that the error which resulted in inadequate damage did not affect the other issues. Even if the question involved were the right of the court to grant a

new trial as to damages alone, that should not be done where there is ground for a strong suspicion that the jury awarded the inadequate damages to plaintiff as a result of a compromise involving the question of liability. Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588; Doody v. Boston, etc., R. R., 77 N. H. 161, 89 A. 487, Ann. Cas. 1914C, 846. Thus, in Moulton v. Langley, 81 N. H. 138, 124 A. 70, 71, the court said: 'The misconduct of a jury in returning a verdict for an unreasonably small sum, in disregard of the evidence and of the instructions of the court, is presumed to extend to the issue of liability in the absence of satisfactory evidence of facts occurring at the trial from which it can be found that it was due to other causes.' "

See also **Southern Ry. Co. v. Madden**, 235 F. (2d) 198, 204 (4th Cir.). In the latter case the jury on the first trial returned a verdict for the plaintiff for $5,000. The Trial Judge allowed this verdict to stand insofar as it established liability on the part of the defendant but set it aside insofar as it fixed the amount of damages and awarded a new trial on the issue of damages alone. On the new trial so awarded the jury returned a verdict in the amount of $75,000. On appeal the judgment was reversed and a new trial ordered on all issues, the Court saying:

". . . The subsequent trial on the issue of damages, resulting in a verdict of $75,000, merely serves to emphasize that the verdict of $5,000 was not merely totally inadequate but could have been rendered only as a sympathy or compromise verdict and could not reasonably have been rendered if the jury had found real liability on the part of defendant. To allow such a verdict to stand as establishing liability while granting a new trial on the issue of damages alone is, in our opinion, not sustainable as a sound exercise of discretion."

In **Rankin v. Shayne Brothers, Inc.**, 234 F. (2d) 35, 37 (Dist. of Col.), the Court said:

> "We refer also to Dunn v. United States, 284 U. S. 390, 394, 52 S. Ct. 189, 191, 76 L. Ed. 356, where it is said that though the verdict, as in the case at bar, possibly may have been the result of compromise, or of a mistake on the part of the jury, 'verdicts cannot be upset by speculation or inquiry into such matters.' Compare, however, such cases as Wallace v. City of Rock Island, 323 Ill. App. 639, 56 N. E. 2d 636."

If the procedure in the case at bar becomes a precedent, a party's right to a jury trial as guaranteed by the Seventh Amendment will in such cases become a mockery. For example, the jury in the case at bar had a right under the law to disbelieve this plaintiff's testimony as to damages because of the many conflicts in his evidence in connection with questions of liability. The jury had a right to disbelieve plaintiff's testimony as to damages because of his interest in the case, his evasiveness, his manner and demeanor on the witness stand, and many other factors well recognized in determining the credibility of a witness. Also it is apparent that the issues of liability and damages were not separable but were inextricably interwoven.

In **Dimick v. Schiedt**, supra, this Court reviewed the common law as it existed at the time of the Seventh Amendment and concluded that while at that time there was authority for the suggestion of a remittitur, there was no authority to support an additur and that the Court's attempt to add to the jury verdict was, therefore, unconstitutional. The Court said (79 L. Ed. 611):

> ". . . When therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial; how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may,

by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."

The action of the Court of Appeals in the case at bar accomplishes by indirection that which this Court has specifically disapproved. In effect, the opinion of the Court of Appeals directs a jury to find damages in an amount in excess of $500 which just as effectively increases the verdict as an additur by the Court would have done. See also **Mutual Benefit Health & Accident Ins. Co. v. Thomas**, 123 F. 2d 353 (8th Cir.); **United States v. Kennesaw Mountain Battlefield Ass'n**, 99 F. 2d 830 (5th Cir.).

III.

The Court of Appeals Has Reviewed a Jury Verdict and Judgment Contrary to Applicable State Law.

Under the decisions of the Courts of Tennessee the verdict of the jury in this case was not inconsistent as a matter of law with the facts of the case nor was the issue of compensatory damages separable from the issue of liability.

In **Woodfolk v. Sweeper**, 21 Tenn. 88, 96, decided by the Tennessee Supreme Court at the December Term, 1840, the plaintiff sued for damages for false imprisonment. The plaintiff alleged that the defendant had wrongfully and illegally detained him in slavery for a period of approximately three years, during which time defendant compelled plaintiff to labor for him as a slave, and that plaintiff was

compelled to expend large sums in prosecuting suits for the recovery of his freedom, to-wit, attorneys' fees, witness fees, and other necessary expenses. The evidence sustained these allegations and the case was submitted to a jury and decided in favor of the plaintiff. On appeal the defendant assigned as error the charge of the Trial Court that the plaintiff was entitled to recover as damages the value of his services for the time he was wrongfully imprisoned, the necessary expenses incurred in recovering his freedom and a reasonable allowance for his attorney fees. Upon this assignment Mr. Justice Turley, speaking for the Court, stated:

> " . . . The error consists in the use of the word 'entitled,' which imports a legal right, and leaves the jury no discretion as to the amount of damages, but really makes it a matter of account, which, we have just said, it cannot be. It must stand, like all other cases of like kind, subject, for the amount of damages, to the discretion of the jury. It was proper in evidence to show the time plaintiff was falsely imprisoned, the value of his labor, the expenses he had been put to in obtaining his freedom, etc. And the judge should have said to the jury that these were legitimate things to be considered of by them in assessing the damages. . . . Inasmuch as proof upon these points could have been heard in aggravation of damages, and the jury might have given the whole, the court determined it should be done upon the case agreed, and the judgment was given accordingly. But this is no determination that a jury is bound to make a full allowance. This defendant may introduce circumstances of mitigation, viz., his ignorance of the plaintiff's right to freedom, his uniform kindness to him in sickness and in health, and many other things which the jury would have the right to take into consideration, and would often pre-

vent their giving what might otherwise be considered the full measure of justice. The case will be reversed and remanded for a new trial."

In **Daniel v. Giles**, 108 Tenn. 242, 244, 66 S. W. 1128, 1129, plaintiff sued for assault and battery and recovered a judgment. Defendant appealed. The issue was whether or not circumstances could be shown in mitigation of damages. The Court said:

"The Court then proceeds to instruct the jury that if they find for the plaintiff under the charge, he would be entitled to recover for mental and physical suffering, loss of time, medical expenses, etc. The Court failed to instruct the jury that any insulting language or provocation offered by the plaintiff at the time of the assault should be considered in mitigation of damages. On the contrary, the consideration of the provocation for any purpose is entirely excluded by the Court in his hypothetical statement of facts, and the jury were instructed that unless the proof showed the defendant acted in self-defense at the time of the assault, the plaintiff would be entitled to recover just such damages as he had sustained. This is an affirmative error, for which the judgment must be reversed and the cause remanded" (p. 244).

To the same effect are the cases of **Jacaway v. Dula**, 15 Tenn. 82, and **Chambers v. Porter**, 45 Tenn. 273-280.

In **Deaderick v. Smith**, 33 Tenn. App. 151, 159, 230 S. W. 2d 406, 410, the action was for false imprisonment, which is closely akin to malicious prosecution, and there was a judgment for the plaintiff alleged to be excessive. The Court said:

"It is insisted that the amounts of the verdicts are excessive. In cases of this kind the question of the amount of the verdict is peculiarly a question for the jury. There is no method of calculating the extent of

the damages in dollars and cents and the amount of the recovery should be left to the discretion of a jury subject to the approval of the trial judge, unless this amount is exorbitant and the result of passion, prejudice, or caprice on the part of the jury. Such does not appear in this case."

It follows from the foregoing that in intentional harm cases in the State of Tennessee the issue of liability is not separate and distinct from the issue of damages either compensatory or punitive. Therefore, the jury in the case at bar had the right and duty to consider all of the circumstances in determining both liability and damages. The verdict was not as a matter of law inconsistent with the facts contained in the record nor was the amount of this verdict for compensatory damages separable from the facts creating liability.

IV.

The Court of Appeals Failed to Apply Applicable State Law in Holding That an Indictment Failed to Show Probable Cause in a Malicious Prosecution Case.

The record in the case at bar shows that the defendant was indicted by a Federal Grand Jury at Memphis, after an extensive investigation had been made by the post office inspector and by representatives of the Securities and Exchange Commission and the Federal Bureau of Investigation in several states. Ten witnesses testified before the Grand Jury, including petitioner. There is no evidence in this record as to the substance of the testimony given by petitioner to the Grand Jury or that petitioner gave false information to the United States District Attorney or to the representatives of Federal Agencies investigating the charges against respondent.

There was evidence that after respondent's fraud was discovered, petitioner threatened respondent with prose-

cution for fraud unless respondent and his associates would reduce their interest in this joint venture. These threats took place in May, June and July, 1951. Petitioner reported the matter to the United States District Attorney in late 1953 and the indictment was returned on February 16, 1954 (7a).

The Court of Appeals held:

> "Since defendant for a considerable period, as shown by the uncontradicted testimony, accepted the activities of plaintiff and Snakard in Padre's affairs without any claim of fraud and later extorted from Snakard and plaintiff practically their entire interest by threats of prosecution, the inference of good faith and probable cause arising from the indictment was rebutted. The question whether defendant acted in good faith in pressing the indictment in 1954, so long after the civil liability of plaintiff, if any, at least in large degree, had been settled, became a question of fact. Under Tennessee law defendant's failure to testify in the malicious prosecution case warranted an inference of bad faith and want of probable cause. Bankhead v. Hall, 238 S. W. (2d) 522, 527, 34 Tenn. App. 412. The District Court did not err in submitting this issue to the jury" (pp. 4-5).

The evidence of threats of prosecution constituted evidence of malice, but from this malice the Court of Appeals was in error in inferring an absence of probable cause.

34 **A. J.**, Malicious Prosecution, 66;
54 **C. J. S.**, Malicious Prosecution, 35;
Dawes v. Starrett, 82 S. W. 2d 43 (Mo.);
Memphis & Gayoso Gas Co. v. Williamson, 56 Tenn. 314;
Levy v. Chasnoff, 283 N. Y. S. 891.

The universal rule on this point is well stated in **Dawes v. Starrett**, supra (p. 45), as follows:

". . . The prevailing rule is that the finding and return of the indictment by the grand jury is prima facie evidence of and establishes probable cause unless the plaintiff in the action for malicious prosecution rebuts the presumption by proof that the defendant in the action for malicious prosecution obtained or induced the indictment by false testimony before the grand jury, or by intentionally withholding or concealing from the grand jury pertinent facts necessary to a full and fair investigation which were known to defendant or which he could by due diligence have ascertained, or by other improper or fraudulent means, or by showing that defendant, though he did not believe the accused to be guilty, obtained or procured the indictment against him."

There was no evidence in this record upon which a finding could be made that the indictment was based upon any false swearing or other improper conduct of petitioner and the Court of Appeals did not so find. Instead, the Court of Appeals inferred from evidence of malice the absence of probable cause.

In **Union Stockyards, Inc., v. Grissim**, 13 Tenn. App. 115, 127, the Tennessee Court of Appeals said:

". . . Malice, alone, however great, is insufficient. Want of probable cause cannot be inferred from malice, however great such malice may be, even 'the most express malice.' 38 C. J. 401-2; 1 Cooley on Torts, 3 Ed. 337; Kendrick v. Cypert, 10 Hump. 294" (p. 127).

To the same effect are the cases of **Kendrick v. Cypert**, 29 Tenn. 296, and **Wheeler v. Nesbit**, 16 L. Ed. 765, 768-769, 65 U. S. 544. In Wheeler v. Nesbit, supra, this Court said:

". . . Malice, alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may, nevertheless, prefer a well founded accusation, and have a justifiable reason for the prosecution of the charge. . . .

"It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained." (pp. 768-769).

The burden is upon the plaintiff to show the absence of probable cause. The indictment was prima facie evidence of probable cause and became conclusive unless it was shown to have resulted from some false swearing or other improper conduct of the defendant **before the Grand Jury.** The Court of Appeals has reasoned that the evidence of malice on the part of the petitioner which occurred in 1951, or **nearly three years before the indictment,** destroyed the presumption that resulted from proof of the indictment.

The only evidence in this record that bears on the defendant's activities in connection with the indictment and his appearance before the Grand Jury is in petitioner's answers to interrogatories which were read into evidence by the respondent and which negative any fraud or false swearing on the part of the defendant (Record 119-b through 122-b).

Wholly aside from the presumption arising from proof of the indictment is the evidence which came from respondent himself showing that he and his associate Snakard were indisputably guilty of certain acts of fraud in December, 1950 and January and February, 1951. The Court of Appeals did not discuss respondent's acts of fraud but held in effect that they were obviated or excused by the acts of the petitioner in dealing with the respondent after such fraud was committed and by the evidence of petitioner's malice.

In this situation the Court of Appeals found on the authority of **Bankhead v. Hall**, 238 S. W. 2d 522, 34 Tenn. App. 412, that the petitioner's failure to testify warranted an inference of bad faith and **want of probable cause.** We

concede that the failure of the petitioner to testify warranted an inference of malice because there was prima facie evidence of malice already in the record, but we earnestly disagree with the conclusion that the failure of the petitioner to testify furnished substantive proof of the absence of probable cause. The effect of petitioner's failure to testify is clearly shown by the case of **National Life & Acc. Insurance Co. v. Eddings**, 188 Tenn. 512, 520-521 (1949), 221 S. W. (2d) 695, 698. In that case the Supreme Court of Tennessee had this exact question before it, although not in a malicious prosecution case, and said:

> "The Court of Appeals is of the opinion that the inference arising from the failure of a party to produce available witnesses or from his failure to cooperate with his adversary in bringing pertinent facts before the Court, does not amount to substantive proof which can be substituted for a fact required to make out his adversary's case. To this we agree. The inference to be drawn from such conduct may well be a persuasive factor in the process of weighing and interpreting the testimony offered by the party who can produce evidence and fails to do so, but it cannot be treated as affirmative evidence of a fact otherwise unproved. Logic and precedent combine to establish this conclusion. 'The extent of a party's right to invoke his opponent's failure to call an available witness is merely to impair the value of the opponent's proofs and to give greater credence to the positive evidence of the party on any issue in which it is shown that the witness might have had knowledge.' 31 C. J. S., Evidence, sec. 156, p. 860. See also Milio v. Railway Motor Trucking Co., 257 App. Div. 640, 15 N. Y. S. (2d) 73.
>
> "'The presumption may be used to throw light on evidence already in; not to make evidence . . . No presumption or inference from the non-production of evidence is potent enough to supply independent evi-

dence of a fact which is wholly unproved by other evidence.' Jones' Commentaries on Evidence, sec. 97.

"A full annotation upon the subject appears in 70 A. L. R. 1326-1330. The cases there cited and the reason supporting them justify the adoption of the following statement quoted from American Jurisprudence and relied on by the Court of Appeals in this case:

"'It may be fairly implied from the cases that the presumption or inference arising from the failure of a party to produce available witnesses or evidence or to testify does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case. . . .'" (pp. 520-521).

If the protection granted by the law by reason of an indictment can be so easily overthrown, every citizen will hesitate to make frank disclosures to prosecuting attorneys and grand juries because they will always be in constant jeopardy of a malicious prosecution case if the prosecution should fail.

CONCLUSION.

For the reasons stated we earnestly insist that this petition for certiorari should be granted.

Respectfully submitted,

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OPINION OF THE COURT ON MOTIONS.

In this cause, on January 6, 1956, the Court, after hearing arguments of counsel on motions for new trial, announced the following ruling:

The Court: Well, gentlemen, of course juries arrive at their verdicts in many and devious ways. It is not required in the Federal Court that the Judge approve a verdict as under the State law a State Judge is required to do. Under our State practice the trial Judge is what we refer to as the thirteenth juror. I am correct about that, I think, Mr. Porter.

Mr. Porter: Yes, sir.

The Court: That used to be the law, and I am sure it still is.

This Court does not approve of every jury verdict rendered in this Court, but, as I say, that is more or less beside the question. I do think juries do substantial justice in a vast majority of the cases. But the jury system is not on trial here.

The Court, of course, has no information as to what went on in the jury room in this case, or what the basis was for arriving at the two verdicts the jury rendered.

The jury's verdict with respect to compensatory damages is not in the Court's opinion inconsistent on its face, as plaintiff's counsel seems to suggest. Nor is the jury's verdict on the exemplary damage count inconsistent on its face.

The Court can't say, Mr. Murray, either verdict of the jury on the two counts submitted to it in this case show on their face an abuse of the jury's power. The Court cannot say that there is no basis in the record for the verdicts rendered. And I believe the Court still has the facts of the case pretty well in mind.

The plaintiff's motion is in all things overruled.

You are saying, Mr. Murray, as I understand you, that there is an obligation on the Court in this case to grant a new trial—or rather, that there is a positive duty on the Court to order a new trial, and that it is not a matter concerning which the Court has discretion. Well, the Court rules, then, so there will be no mistake about it, that as a matter of law this plaintiff is not entitled to a new trial, and that if it is a discretionary matter, the Court exercises its discretion to overrule the motion, if you get what I mean.

All right, get up an order——

Mr. Murray: I am not clear what you mean, Judge; I did not catch——

The Court: I said you are saying——

Mr. Murray: I understood what you said my contention was, but the last remark there——

The Court: I say if this is a discretionary matter for the Court, the Court exercises its discretion in overruling the motion. Generally speaking the Court has some discretion in dealing with motions for new trial, and you have put this up to the Court as being a matter under which there is a positive obligation on the Court——

Mr. Murray: As a matter of law there is.

The Court: As a matter of law——

Mr. Murray: Yes, sir.

The Court: ——To grant you a new trial. And I am simply saying that as a matter of law you are not entitled to the relief you seek here, nor are you entitled to have the Court in its discretion grant a new trial.

Mr. Murray: Then the result of it is both motions are overruled, then.

The Court: Well, with respect to Mr. Porter's motion, the Court thinks the case was properly submitted to the jury, and that it was a question for the jury, and the jury's verdict settled the matter.

Mr. Porter: Yes, sir.

Mr. Murray: Thank you, Judge.

(Discussion.)

Mr. Murray: You did say both motions are overruled?
The Court: Yes, I did say both motions are overruled.
Mr. Murray: Plaintiff's and defendant's?
The Court: Yes, sir.
Mr. Murray: That is what I heard.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Causes Argued and Submitted.

December 10, 1956—Before: Allen, Stephens and Miller, Circuit Judges.

These causes are argued by Charles V. Garnett for V. J. Devine and by John S. Porter for James S. Patteson, Jr., and are submitted to the court.

Judgment.

No. 12,877.

(Filed March 29, 1957.)

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court as to compensatory damages is set aside and a new trial is ordered upon that issue only. The judgment in all other respects is affirmed.

Judgment.

No. 12,878.

(Filed March 29, 1957.)

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court as to compensatory damages is set aside and a new trial is ordered upon that issue only. The judgment in all other respects is affirmed.

Opinion.

(Filed March 29, 1957.)

No. 12877-78.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Dr. V. J. Devine, Appellant and Cross-Appellee, v. James S. Patteson, Jr., Appellee and Cross-Appellant.	Appeal from the District Court of the United States for the Western District of Tennessee, Western Division.

Decided March 29, 1957.

Before Allen, Stephens* and Miller, Circuit Judges.

Allen, Circuit Judge. These appeals arise out of a complaint filed by Dr. V. J. Devine, plaintiff-appellant and

* Albert Lee Stephens of the Ninth Circuit.

cross-appellee, hereinafter called plaintiff, against James S. Patteson, Jr., defendant-appellee and cross-appellant, hereinafter called defendant, praying for damages for malicious prosecution. Plaintiff and William F. Snakard had been indicted February 16, 1954, for use of the mails in interstate transportation and use of instruments of transportation and communication in interstate commerce in an alleged conspiracy to defraud defendant and others in violation of Title 18 U. S. C., Section 371, Section 1341, and 15 U. S. C., Section 77 q (a) (1) and 77 e (a). The transactions covered by the indictment dealt with negotiations and agreements as to oil properties in Texas and as to a gasoline plant in Illinois. They involved witnesses and events in three states. The trial consumed almost two weeks. Plaintiff and Snakard were acquitted. Later plaintiff filed this action for damages against defendant, who had been prosecuting witness in the indictment.

The complaint averred that defendant maliciously, intentionally, and without just cause stated to the United States District Attorney that plaintiff had violated certain laws of the United States. At the trial of the malicious prosecution case plaintiff testified that the actual expense to which he was personally subjected in contesting the prosecution, consisting mainly of attorneys' fees and traveling expenses, amounted to over $19,000. This was not disputed. Defendant did not take the stand and no evidence was introduced to the contrary. The jury returned a verdict for plaintiff, allowing compensatory damages in the sum of $500.00 and punitive damages in the sum of $1.00.

The complicated indictment contained 8 counts, all based upon transactions alleged to be fraudulent, and charged numerous overt acts and other transactions which need not be set forth. Snakard, plaintiff, and others unknown, hereinafter called the Devine group, were charged with having misrepresented in 1950 and 1951, in pursuance of an

unlawful conspiracy, their ownership of certain assets which were proposed by the Devine group to be transferred to a joint venture for the operation of the mutual benefit of the Devine group and defendant and others, hereinafter called the Patteson group.

The evidence in the instant case was in conflict upon the principal claims of misrepresentation. We do not discuss them because the jury found for plaintiff and necessarily found that the misrepresentations alleged had not been made and the fraudulent acts charged had not been performed.

Plaintiff's appeal attacks only the amount of the verdict. He contends that, as the jury found defendant liable for malicious prosecution, it was required to consider the elements of damage shown by the uncontradicted testimony as to the extensive legal and traveling expenses incurred in the criminal prosecution. Plaintiff contends that the jury's failure to consider the uncontradicted evidence is so inconsistent with its verdict on liability as to require reversal and a new trial upon that feature of the case as a matter of law.

Defendant's cross-appeal is based principally upon the ground that the returning by the grand jury of an indictment against plaintiff and Snakard constituted prima facie evidence of probable cause, which was in no way rebutted in the instant trial; that there was no evidence from which the jury could rightly conclude that the indictment was procured by fraud, false testimony, concealment of material facts, malice, lack of good faith, or other improper contrivance on the part of defendant; and that the motion for directed verdict or for judgment non obstante should have been sustained. If this contention is correct, we do not reach the question of damages and therefore we first consider whether the District Court erred in submitting the issue of probable cause to the jury. The existence of prob-

able cause is in general a mixed question of law and fact. Cf. **F. W. Woolworth Company v. Gustine Connors**, 142 Tenn. 678. The "'honest reasonable belief of the party commencing the prosecution'" is a material element in the determination of probable cause. **F. W. Woolworth Company v. Gustine Connors**, supra. The advice of the District Attorney must be honestly sought in order that the defense of probable cause may be sustained. **Cooper v. Flemming**, 114 Tenn. 40; **Nashville Union Stockyards, Inc., v. Grissim**, 13 Tenn. App. 115.

The District Court charged the jury fully upon the applicable law of probable cause and no question is raised here as to the correctness of the charge. He instructed the jury that:

> "Where it appears that there was probable cause, that is, reasonable cause to believe the plaintiff had been guilty of the crimes with which he was charged, or any one of them, for the institution of the original criminal proceedings, then same would be an absolute defense in this action. . . .
>
> ". . . if you find from the proof that the defendant, at the time the prosecution herein was instituted, acted upon such state of facts known to him as would induce a belief in the mind of a prudent and discreet man that an offense had been committed by the plaintiff Devine, he would not be liable."

These instructions were certainly favorable to defendant. In view of these and other portions of the charge it is evident that the jury found that the defendant in pressing the criminal charge did not act in good faith, nor under an "honest" belief in plaintiff's guilt. If there was evidence to support such a finding the District Court was required to submit the question to the jury.

Defendant stresses the fact that prior to the indictment the United States postal inspector made an extensive in-

vestigation in locations in Arkansas, Tennessee, and various cities of Texas, interviewing numerous persons before the indictment was returned. The Securities and Exchange Commission and the FBI at certain points conferred with the postal department. However, it was shown without contradiction that, while the alleged fraudulent acts and representations of the Devine group took place around December, 1950, and January, 1951, early in that year Snakard was removed as trustee of Padre by agreement between the parties. Around March 20, 1951, the Patteson group was given full authority to control future Padre operations, and the Devine group turned over to the Patteson group a 29% interest in Padre. In May, 1951, defendant's control of Padre was extended. It was not shown in the instant case that the minutes of the meetings held in connection with these transactions suggest that plaintiff and Snakard had conspired to defraud the investors.

In July, 1951, defendant and Magnussen held Snakard in defendant's hotel room at Brownwood, Texas, under threats of arrest and prosecution for the purpose of securing a further 15% from the Devine group. It is not denied that about this time defendant told plaintiff that if plaintiff or his group did not turn over the 15% interest plaintiff would be prosecuted and defendant would see that it got "in every paper in the United States." In defendant's testimony given in the criminal case, introduced in the instant trial, defendant admitted that he forced Snakard to call his brother and plaintiff and tell them that unless they reduced their interest to 1% "we would prosecute him for fraud." Defendant said that "We certainly told him that if he did not put these telephone calls through, we were going to start prosecution . . . we just told them that either they were going to reduce it [their interest] or we would start prosecution." He said, "My group . . . got Bill Snakard down in Brownwood, Texas, and extracted

from him his fifteen per cent." The minutes of July 17, 1951, show that the 15% interest was taken from the Devine group. Defendant, who on June 1, 1951, had secured a mortgage of $45,000 covering all the Padre properties, later foreclosed the mortgage and became sole owner. Padre's financial report of February 29, 1952, shows an ownership equity in Padre of $345,809.96. This testimony was not contradicted. Defendant did not take the stand in the malicious prosecution case.

Since defendant for a considerable period, as shown by the uncontradicted testimony, accepted the activities of plaintiff and Snakard in Padre's affairs without any claim of fraud and later extorted from Snakard and plaintiff practically their entire interest by threats of prosecution, the inference of good faith and probable cause arising from the indictment was rebutted. The question whether defendant acted in good faith in pressing the indictment in 1954, so long after the civil liability of plaintiff, if any, at least in large degree, had been settled, became a question of fact. Under Tennessee law defendant's failure to testify in the malicious prosecution case warranted an inference of bad faith and want of probable cause. **Bankhead v. Hall**, 238 S. W. (2d) 522, 527, 34 Tenn. App. 412. The District Court did not err in submitting this issue to the jury.

Defendant raises a second question which we deem it unnecessary to discuss in detail. He maintains that if is shown by undisputed proof that the substance of the charges in the indictment is true and therefore contends that the judgment against him should be reversed under the doctrine of **Bry-Block Mercantile Company, Inc., v. Proctor**, 10 Tenn. App. 651. However, the premise of this contention is lacking. The proof claimed to establish the substance of the charges in the indictment was not undisputed. The material charges of the case were controverted

and the jury, in fact, found that they were not true. The cited decision has no application.

We conclude that defendant's cross-appeal has no merit.

As to plaintiff's appeal, in his contention that the verdict must be set aside for inadequacy of the amount awarded plaintiff relies upon a decision of this court, **Reisberg v. Walters**, 111 Fed. (2d) 595? We there held that the award of a jury in a personal injury case arising out of an automobile accident was grossly inadequate if it failed to consider essential elements of damages in an amount conceded to have been suffered, and demonstrated that the jury had failed to abide by the instruction of the court. The **Reisberg** decision reaffirmed the doctrine of **Pugh v. Bluff City Excursion Company**, 177 Fed. 399, 401 (C. A. 6), which held that in case of inadequacy of verdict such as here presented it was error of law to overrule a motion for new trial. Cf. **Miller v. Maryland Casualty Company**, 40 Fed. (2d) 463 (C. A. 2). In this case Judge Learned Hand, speaking for the court, declared that, while courts will rarely review an award for damages, orders refusing new trials because of the amount of the verdict have been reversed in cases where the jury did not attempt to appraise the plaintiff's loss at all and where the verdict was less than the amount of undisputed loss. Cf. **Spero-Nelson v. Brown**, 175 Fed. (2d) 86 (C. A. 6), in which the doctrine of the **Reisberg** case, supra, was specifically approved.

Defendant contends that since the testimony as to legal expense was given by plaintiff only the jury was authorized to disregard it. But it is uncontradicted that plaintiff made preliminary legal investigations in three states, employed numerous lawyers in all of these states, and vigorously contested the criminal prosecution lasting almost two weeks. These undisputed facts constitute evidence of expense in addition to plaintiff's statements.

Since the verdict was less than the amount of the loss shown and not disputed, the motion for new trial should have been granted. We see no essential difference between physical damage suffered in a personal injury case and professional and psychological damage suffered in the trial of a criminal case. While there was controversy as to defendant's liability, there was no controversy as to the necessity of plaintiff's incurring the expenses listed, nor as to the fact that they were actually incurred. The award of $500 was around 1/40 of the actual and specific damages proved and nothing was allowed for the undisputed injury shown to have been suffered by plaintiff in his professional reputation, standing, and loss of practice.

While in general the granting of a new trial is a matter of discretion with the court, it is not so when the verdict is inconsistent on its face. **Pugh v. Bluff City Excursion Company**, supra. The jury found plaintiff was entitled to recover. In view of the undisputed evidence as to expense caused by the wrongful prosecution it is evident that the jury did not comply with the instructions of the court.

As to punitive damages the award is peculiarly within the discretion of the jury. We cannot say that the discretion was abused, and we do not set aside the verdict of $1.00. **Davis v. Farris**, 1 Tenn. App. 144; **Hostettler v. Vaden**, 13 Tenn. App. 454, 123 A. L. R. 1130.

The District Court erred in not granting a new trial limited to the question of compensatory damages. Federal Rules of Civil Procedure, rule 59 (a), 28 U. S. C.; **Chesevski v. Strawbridge & Clothier**, 25 Fed. Supp. 325; Barron and Holtzoff, Federal Practice and Procedure, Vol. 3, § 1304, § 1307, which reads as follows:

> "If issues are framed for the jury and the issue as to which a new trial is required is separate from all other issues, and the error requiring a new trial

does not affect the determination of any other issue, the scope of the new trial may be limited to the single issue. Thus new trials have been limited to the issue of damages. . . ."

A majority of the court thinks it would be unjust to a plaintiff who has proved to the satisfaction of the jury that he was subjected to a malicious prosecution to have to retry the question, not only of damages, but also of liability. If the issues are as we think, separate and distinct, conceivably plaintiff might be compelled to pay a second very large amount for legal expenses in order to collect the amounts expended in the first suit. A majority of the court considers that the issue of damages here is entirely separate from other issues presented. If the issue of compensatory damages is retried defendant will have a second opportunity to contest the claimed legal and other expenses which in the instant case he did not contradict. This is not unjust to him nor does it in any way affect the question of liability. Whether plaintiff spent $500, $5,000, or $19,000 in fighting the indictment has no bearing upon whether defendant maliciously and without probable cause secured plaintiff's indictment. The amount of the expense has no probative connection with the issue of liability, hence the case may be retried singly.

We think this conclusion is in accord with the applicable law. While a new trial should cover the issue of liability as well as of damages if these issues are so interwoven as to be inseparable, we think this case does not call for the application of that rule. The majority of the cases cited in the dissenting opinion are personal injury cases. In this type of controversy obviously the imponderables arising from cases which present highly emotional features are omnipresent. In a number of the cases cited there was an issue, not only of negligence

but of contributory negligence. **Southern Railway Company v. Frank J. Madden**, 235 Fed. (2d) 198 (C. A. 4); **Bass v. Dehner**, 21 Fed. Supp. 567, affirmed 103 Fed. (2d) 28 (C. A. 10); **Grant & Company v. Tanner**, 170 Tenn. 451. The Fourth Circuit in **Southern Railway Company v. W. W. Neese**, 216 Fed. (2d) 772, held that the issues of damage and liability were separate and distinct. This case was reversed by the Supreme Court, 350 U. S. 77. However, in both decisions, that of the Circuit Court and that of the Supreme Court, the verdict as to liability was sustained.

In the **Madden** case, as to the issue of liability the Fourth Circuit found that prejudicial error existed in the admission of testimony and in the charge of the court. Quoting from and following an opinion by Chief Justice Rugg in **Simmons v. Fish**, 240 Mass. 563, the court held in effect that it was obvious in the **Madden** case that no jury had decided the issue of liability against the railway company on "justifiable grounds."

Here defendant's contention as to liability is that the undisputed facts demonstrated the existence of probable cause. This issue was correctly submitted to the jury, which found in favor of the plaintiff and the finding is supported by the record. Reversible error exists only in the amount of the verdict. **Chesevski v. Strawbridge & Clothier**, supra; **Dodson v. Baker**, 1 F. R. D. 368.

The judgment as to compensatory damages is set aside and a new trial is ordered upon that issue only. The judgment in all other respects is affirmed.

Miller, Circuit Judge, dissenting. I am in agreement with the statement in the majority opinion of the general rule that under certain conditions where the issue of damages is entirely separate from the issue of liability, a new trial may be granted limited to the issue of damages only. This Court has so held. **Thompson v.**

Camp, 167 F. (2d) 733, C. A. 6th. But as stated in that case, the court should proceed with caution, with a careful regard for the rights of both parties, and only in those cases where it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue. The error in that case was an error in the instructions dealing with the question of damages and had no bearing on the issue of liability. In my opinion, the rule is not applicable to the present case.

It is, of course, true as stated in the majority opinion, that as an abstract question of law whether the plaintiff spent, $500, $5,000 or $19,000 in fighting the indictment has no bearing upon whether defendant maliciously and without probable cause secured plaintiff's indictment. This would be a complete answer to the issue here involved if the jury followed this principle of law in reaching its verdict. It seems to me that the jury not only refused to follow the law and the evidence on the question of damages, which is the basis of the ruling that a new trial should be granted, but also at the same time refused to follow this principle of law which requires that questions of liability and damage be independently determined. I do not think we can reasonably say with any degree of certainty that the jury refused to follow the law on the question of damages but did follow the law on the question of liability. Verdicts which are obviously compromise verdicts show rather conclusively that as a practical matter, and in disregard of the rule of law to the contrary, the questions of the amount of damages and determination of liability are closely interwoven. This appears to me to be such a case.

It seems clear to me that this was a compromise verdict, that most of the jurors in this case were not in favor of returning a verdict for the plaintiff, and would

not have agreed to a verdict for the plaintiff if it would result in awarding to him any substantial amount. If the jury had unanimously been in favor of a verdict for the plaintiff, the amount of the verdict would undoubtedly have been many times greater. The evidence to sustain such an amount was undisputed. There was no reason appearing in the record why as reasonable jurors they would not have followed the evidence on this issue if they were satisfied that the defendant wronged the plaintiff as claimed. To me, the obvious answer as to why the verdict was only $500 is not that they failed or refused to follow the evidence on the question of damages, but that most of the jurors were not satisfied that there should be a verdict in any amount against the defendant. With a few jurors strongly favoring a verdict in a substantial amount, and in order to reach a verdict and avoid a new trial those jurors opposed to a verdict for the plaintiff agreed to return a verdict for him if it was limited to a relatively small amount. This appears to me to be a more logical analysis of the verdict than to say that the twelve jurors were unanimously in favor of a verdict for the plaintiff, but arbitrarily refused to follow the law and evidence on the question of damages. In the present case it is at least probable that the questions of liability and the amount of damages were, as a practical matter, so closely interwoven that if a new trial is to be granted, it should be granted in its entirety and not limited to the question of damages only. **Schuerholz v. Roach**, 58 F. (2d) 32, 34, C. A. 4th, cert. denied, 287 U. S. 623; **Southern Railway Co. v. Madden**, 235 F. (2d) 198, 204 C. A. 4th. Unless it clearly appears that the issue of damages was distinct and separable from the issue of liability, a new trial on the issue of damages alone should not be granted. **Gasoline Products Co. v. Champlin Refining Co.**, 283 U. S. 494, 500; **Thompson v. Camp**, supra, 167 F. (2d) 733, 734, C. A. 6th.

The point is well illustrated by the case of **Bass v. Dehner,** 21 F. Supp. 567, where the Court granted a new trial because the damages were inadequate but refused to limit the new trial to the question of damages only. On the retrial the jury returned a verdict for the defendant. **Bass v. Dehner,** 103 F. (2d) 28, C. A. 10th, cert. denied, 308 U. S. 580, rehearing denied, 308 U. S. 635.

The question usually arises in tort actions, although it is not so restricted. **Gasoline Products Co. v. Champlin Refining Co.,** supra, 283 U. S. 494, 500. The present action is a tort action. See also: **W. T. Grant Co. v. Tanner,** 170 Tenn. 451, 95 S. W. (2d) 926; **Simmonds v. Fish,** 210 Mass. 563, 97 N. E. 102; **Leipert v. Honold,** 39 Cal. (2d) 462, 247 Pac. (2d) 324; **Johnson v. Sgourakis,** 20 N. J. Super. 77, 89 A. (2d) 273; **Parker v. Allen,** 171 Kan. 360, 233 Pac. (2d) 514; **Flaugh v. Egan Chevrolet, Inc.,** 202 Minn. 615, 279 N. W. 582; **Reay v. Beasley,** 49 Arizona 362, 66 Pac. (2d) 1043; **Murray v. Krenz,** 94 Conn. 503, 109 A. 859, 861.

I do not believe the ruling in **Southern Railway Company v. W. W. Neese,** 216 F. (2d) 772, C. A. 4th, cited in the majority opinion, should be relied upon. As noted in the majority opinion this ruling of the Court of Appeals was subsequently reversed by the Supreme Court, 350 U. S. 77. Also, the same Court of Appeals later held that where it is clear that an inadequate verdict is a compromise verdict, the new trial should not be limited to the question of damages alone. Southern Railway **Company v. Madden,** supra, 235 F. (2d) 198, 204, C. A. 4th.

I think the statement of the Supreme Court in **Dimick v. Schiedt,** 293 U. S. 474, 486, is directly applicable to this case and states the rule which we should follow. The Court said: "Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should

not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages.'" (Emphasis added.) As pointed out in the majority opinion, this court has in two cases held that a new trial should have been granted by reason of inadequacy of damages. **Pugh v. Bluff City Excursion Co.**, 177 F. 399, C. A. 6th; **Reisberg v. Walters**, 111 F. (2d) 595, C. A. 6th. Although the question is not discussed in the opinions, in neither of the cases was the new trial limited to the question of damages. In the **Reisberg** case we referred to **Dimick v. Schiedt**, supra, 293 U. S. 474, as being one of the cases pointing the way to our ruling in that case, and quoted in the opinion the foregoing statement of the Supreme Court.

Nos. 12,877, 12,878.

In the
UNITED STATES COURT OF APPEALS,
For the Sixth Circuit.

Dr. V. J. Devine,
Appellant and Cross-Appellee,

vs.

James S. Patteson, Jr.,
Appellee and Cross-Appellant.

Petition to Rehear.

(Filed April 12, 1957.)

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit:

MAY IT PLEASE THE COURT:

Comes the appellee and cross-appellant James S. Patteson, Jr., and petitions the Court to grant him a rehearing in this cause upon the grounds stated herein.

This cause was decided on March 29, 1957, at which time the judgment of the District Court on a jury verdict as to compensatory damages was set aside and a new trial ordered upon that issue only. The judgment of the District Court rendered on the jury verdict was otherwise affirmed.

The Jury Verdict for Compensatory Damages Is Not Inconsistent With the Facts of the Case as a Matter of Law and Is Not a Separate and Distinct Issue.

This case originated in the State of Tennessee and the decisions of that state's courts govern the substantive rights of the parties. Under these decisions the verdict of the jury is not inconsistent as a matter of law with the facts of the case nor is the issue of compensatory damages separable from the issue of liability.

In the case of **Woodfolk v. Sweeper**, 21 Tenn. 88, decided by the Tennessee Supreme Court at the December Term, 1840, in an opinion by Mr. Justice Turley, the plaintiff sued for damages for false imprisonment. The plaintiff alleged that the defendant had wrongfully and illegally detained him in slavery for a period of approximately three years, during which time defendant compelled plaintiff to labor for him as a slave, and that plaintiff was compelled to expend large sums in prosecuting suits for the recovery of his freedom, to-wit, attorneys' fees, witness fees, and other necessary expenses. The evidence sustained these allegations and the case was submitted to a jury and decided in favor of the plaintiff. On appeal the defendant assigned as error the charge of the Trial Court that the plaintiff was **entitled** to recover as damages the value of his services for the time he was wrongfully imprisoned, the necessary expenses incurred in recovering his freedom and a reasonable allowance for his attorney fees. Upon this assignment the Court held:

"* * * The error consists in the use of the word 'entitled,' which imports a legal right; and leaves the

jury no discretion as to the amount of damages, but really makes it a matter of account, which, we have just said, it cannot be. It must stand, like all other cases of like kind, subject, for the amount of damages, to the discretion of the jury. It was proper in evidence to show the time plaintiff was falsely imprisoned, the value of his labor, the expenses he had been put to in obtaining his freedom, etc. And the judge should have said to the jury that these were legitimate things to be considered of by them in assessing the damages. * * * Inasmuch as proof upon these points could have been heard in aggravation of damages, and the jury might have given the whole, the court determined it should be done upon the case agreed, and judgment was given accordingly. But this is no determination that a jury is bound to make a full allowance. This defendant may introduce circumstances of mitigation, viz., his ignorance of the plaintiff's right to freedom, his uniform kindness to him in sickness and in health, and many other things which the jury would have the right to take into consideration, and would often prevent their giving what might otherwise be considered the full measure of justice. The case will be reversed and remanded for a new trial."

In the case of **Daniel v. Giles**, 108 Tenn. 242, plaintiff sued for assault and battery and recovered a judgment. Defendant appealed. The issue was whether or not circumstances could be shown in mitigation of damages. The Court said:

"The Court then proceeds to instruct the jury that if they find for the plaintiff under the charge, he would be entitled to recover for mental and physical suffering, loss of time, medical expenses, etc. The Court failed to instruct the jury that any insulting language or provocation offered by the plaintiff as

> the time of the assault should be considered in mitigation of damages. On the contrary, the consideration of the provocation for any purpose is entirely excluded by the Court in his hypothetical statement of facts, and the jury were instructed that unless the proof showed the defendant acted in self-defense at the time of the assault, the plaintiff would be entitled to recover just such damages as he had sustained. This is an affirmative error, for which the judgment must be reversed and the cause remanded" (p. 244).

To the same effect are the cases of **Jacaway v. Dula**, 15 Tenn. 82, and **Chambers v. Porter**, 45 Tenn. 273-280.

In the case of **Deaderick v. Smith**, 33 Tenn. App. 151, 230 S. W. 2d 406, the action was for false imprisonment which is closely akin to malicious prosecution and there was a judgment for the plaintiff alleged to be excessive. The Court said:

> "It is insisted that the amounts of the verdicts are excessive. In cases of this kind the question of the amount of the verdict is peculiarly a question for the jury. There is no method of calculating the extent of the damages in dollars and cents and the amount of the recovery should be left to the discretion of a jury subject to the approval of the trial judge, unless this amount is exorbitant and the result of passion, prejudice, or caprice on the part of the jury. Such does not appear in this case" (p. 159).

It follows from the foregoing that in intentional harm cases in the State of Tennessee the issue of liability is not separate and distinct from the issue of damages either compensatory or punitive.

By reason of the foregoing authorities the jury in the case at bar had the right and duty to consider all of the circumstances in determining both liability and damages.

The verdict was not as a matter of law inconsistent with the facts contained in the record nor was the amount of this verdict for compensatory damages separable from the facts creating liability.

In the case of **Bigelow v. Sickles** (Wis. 1891), 49 N. W. 106, plaintiff sued for malicious prosecution and in that case the Supreme Court of Wisconsin held that it was proper to introduce evidence of the plaintiff's guilt "both in proof of probable cause and in mitigation of damages and without proof that he was informed of the testimony before he made the charge."

In the case of **Wallner v. Fidelity & Deposit Co.** (Wis., 1948), 33 N. W. 2d 215, 10 A. L. R. 2d 475, plaintiff sued for false imprisonment. The facts were that an officer admittedly arrested the wrong person on a warrant. The Court said:

> "An officer's mistake under such circumstances, while not a justification, **may reduce damages** and show want of malice." (Emphasis ours.)

To the same effect are the cases of **Schnaufer v. Price**, 124 S. W. 2d 940 (1939), and **Glover v. Heyward**, 94 N. E. 878 (S. C., 1918).

Malice of the Most Express Character Will Not Establish the Absence of Proper Cause.

This Honorable Court has in its opinion pointed up very forcefully the evidence of malice shown against the defendant and has inferred from this evidence the absence of probable cause. Under the controlling authorities in the State of Tennessee this inference cannot be drawn from evidence of malice.

The indictment in the case at bar evidenced probable cause just as the act of the Trial Judge in granting the

injunction evidenced probable cause in the case of **Memphis Gayoso Gas Co. v. Williamson**, 56 Tenn. 314, where the Supreme Court of Tennessee in this connection said:

> " * * * Nothing is said in the charge as to the weight to be given, on the question of probable cause, to the fact Judge Trigg, after argument, entertained jurisdiction of the case and granted the injunction. It is clear that this fact constituted the starting point in the investigation of the question of probable cause. As a matter of law, it was sufficient evidence of probable cause until overturned by evidence of fraud or improper conduct in procuring the decision to be made. The burden was on the plaintiff to make proof to overcome this prima facie evidence furnished by the action of the judge."

There is abundant proof from which the jury could have found malice but there is no proof from which the jury could have found that the defendant testified falsely before the Grand Jury, was not a truthful witness at any time, procured others to testify falsely before the Grand Jury or did anything whatsoever to cause the Grand Jury to act oppressively against the plaintiff. The problems of counsel for the defendant are not created in any sense by the failure of the defendant to either speak or testify openly, candidly and truthfully but on the contrary our problems are due largely to the fact that the defendant either talked or testified too much as to matters against his own interest.

In **Union Stockyards, Inc., v. Grissim**, 13 Tenn. App. 115, the Tennessee Court of Appeals said:

> " * * * Malice, alone, however great, is insufficient. Want of probable cause cannot be inferred from malice, however great such malice may be, even 'the most express malice.' 38 C. J. 401-2; 1 Cooley on Torts, 3 Ed. 337; Kendrick v. Cypert, 10 Hump. 294" (p. 127).

To the same effect are the cases of **Kendrick v. Cypert**, 29 Tenn. 290, and **Wheeler v. Nesbit**, 16 Law Ed. 765.

In the case of **Wheeler v. Nesbit**, supra, the Court said:

> "* * * Malice, alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may, nevertheless, prefer a well founded accusation, and have a justifiable reason for the prosecution of the charge. * * *
>
> "It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained" (pp. 768-769).

The burden is upon the plaintiff to show the absence of probable cause. The indictment was prima facie evidence of probable cause and became conclusive unless it was shown to have resulted from some false swearing or other improper conduct of the defendant **before the Grand Jury.** This Honorable Court has reasoned that the evidence of reprehensible conduct on the part of the defendant which occurred in 1951 or **three years before the indictment,** destroyed the presumption that resulted from proof of the indictment.

We most respectfully insist that the starting point of this investigation as stated by the Supreme Court of Tennessee in **Memphis Gayoso Gas Co. v. Williamson,** supra, and by all other authorities that have considered the question was the indictment itself.

The only evidence in this record that bears on the defendant's activities in connection with the indictment and his appearance before the Grand Jury is the defendant's answers to interrogatories which were read into evidence by the plaintiff and which negative any fraud or false swearing on the part of the defendant (Record 119-b through 122-b).

Wholly aside from the presumption arising from proof of the indictment is the evidence which came from the plaintiff himself showing that he and his associate Snakard were indisputably guilty of certain acts of fraud in December, 1950 and January and February, 1951. This Honorable Court did not discuss these acts of fraud but held in effect that they were obviated or excused by the acts of the defendant in dealing with the plaintiff after such fraud was committed and by the evidence of defendant's malice. The opinion of the Court supports this holding by pointing to the fact that the defendant failed to testify.

We concede that plaintiff's testimony if believed would show malice on the part of the defendant, but there was nothing in his testimony that attempted to deal with the evidence presented to the Grand Jury or to explain his own fraudulent acts. Neither laches nor condonation by the defendant would relieve the plaintiff of the effect of his fraudulent acts and the defendant's malice would not supply proof of the absence of probable cause in aid of plaintiff's case.

In this situation this Court has found on the authority of **Bankhead v. Hall**, 238 S. W. 2d 522, 34 Tenn. App. 412, that the defendant's failure to testify warranted an inference of bad faith and **want of probable cause.** We heartily agree that the failure of the defendant to testify warranted an inference of malice because there was prima facie evidence of malice already in the record, but we earnestly and respectfully disagree with the conclusion that the failure of the defendant to testify furnished substantive proof of the absence of probable cause. The effect of defendant's failure to testify is clearly shown by the case of **National Life & Acc. Insurance Co. v. Eddings**, 188 Tenn. 512 (1949), 221 S. W. 2d 695. In that case the Supreme Court had this exact question before it although not in a malicious prosecution case. On this point the Court said:

"'The Court of Appeals is of the opinion that the inference arising from the failure of a party to produce available witnesses or from his failure to cooperate with his adversary in bringing pertinent facts before the Court, does not amount to substantive proof which can be substituted for a fact required to make out his adversary's case. To this we agree. The inference to be drawn from such conduct may well be a persuasive factor in the process of weighing and interpreting the testimony offered by the party who can produce evidence and fails to do so, but it cannot be treated as affirmative evidence of a fact otherwise unproved. Logic and precedent combine to establish this conclusion. 'The extent of a party's right to invoke his opponent's failure to call an available witness is merely to impair the value of the opponent's proofs and to give greater credence to the positive evidence of the party on any issue in which it is shown that the witness might have had knowledege.' 31 C. J. S., Evidence, sec. 156, p. 860. See also Milio v. Railway Motor Trucking Co., 257 App. Div. 640, 15 N. Y. S. (2d) 73.

"'The presumption may be used to throw light on evidence already in; not to make evidence. . . . No presumption or inference from the non-production of evidence is potent enough to supply independent evidence of a fact which is wholly unproved by other evidence.' Jones' Commentaries on Evidence, sec. 97.

"A full annotation upon the subject appears in 70 A. L. R. 1326-1330. The cases there cited and the reason supporting them justify the adoption of the following statement quoted from American Jurisprudence and relied on by the Court of Appeals in this case:

"'It may be fairly implied from the cases that the presumption or inference arising from the failure of a party to produce available witnesses or evidence

or to testify does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case . . . .'" (pp. 520-521).

The case of **Bankhead v. Hall**, supra, is not inconsistent with the holding of the Supreme Court in the case of **National Life & Acc. Insurance Co. v. Eddings**, supra, and shows clearly that such failure to testify may be the basis for an inference in favor of evidence already in the record but cannot be construed as substantive evidence in support of plaintiff's case.

Conclusion.

The record discloses in this case that the jury was charged at 1:30 o'clock P. M. on December 6, 1955 (Record, 564). At the completion of the charge the jury remained out until 5:30 P. M. December 6, 1955, at which time it had failed to arrive at a verdict (Record 609). At that time the foreman of the jury advised the Court that the jury desired additional instructions (Record 610). On the morning of December 7, 1955 the foreman made a specific request for an additional charge on probable cause (Record 611 through 614). The Court then charged the jury anew by delivering his entire charge for the second time (Record 614 through 654). The jury then retired to consider further its verdict and returned to the court room at 12:25 P. M. December 7, 1955 (Record 657). That afternoon the jury again retired to further consider its verdict (Record 660) and finally returned its verdict late in the evening on December 7, 1955.

Evidence of the foregoing extensive deliberations on the part of the jury lends tremendous support to the well-reasoned dissenting opinion of Judge Miller. Under these circumstances we earnestly beseech the Court to re-examine the reasoning contained in Judge Miller's opinion particularly in the light of controlling Tennessee law which we failed to cite to the Court in our earlier brief.

We have diligently searched the authorities and we have failed to find a single malicious prosecution or false imprisonment case decided by either the Federal courts or by the appellate courts of the various states where a jury verdict was set aside and the cause remanded for assessment of damages only. These annotations which we have examined are as follows:

Excessiveness or Inadequacy of Damages for Malicious Prosecution, 35 A. L. R. 2d 308;

Propriety of Limiting to Issue of Damages Alone New Trial Granted on Ground of Inadequacy of Damages Awarded, 98 A. L. R. 941;

Propriety of Limiting to Damages Alone New Trial Granted on Ground of Inadequacy of Damages Awarded, 29 A. L. R. 2d 1199.

Appellee and cross-appellant respectfully prays that this Honorable Court grant him a rehearing; and

1. Affirm the Trial Court because the verdict is not as a matter of law inconsistent with the facts of the case; or

2. Remand the case for a new trial on all issues.

Respectfully submitted,

John S. Porter,
Attorney for Appellee and Cross-Appellant James S. Patteson, Jr.

I, John S. Porter, certify that this petition to rehear is not filed for purposes of delay.

This 10th day of April, 1957.

John S. Porter.

Order Denying Rehearing.

(Filed April 30, 1957.)

The petition for rehearing is denied. Judge Miller is of the opinion that the petition should be granted.

Office Supreme Court, U.S.
FILED
JUL 19 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 203

JAMES S. PATTESON, JR.,
Petitioner,

vs.

V. J. DEVINE,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI.

ROBERT M. MURRAY,
1000 Temple Building,
Kansas City, Missouri,
and
JAMES T. HAYNES,
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Memphis, Tennessee,
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RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE COURT:

Respondent prays that the Court refuse to grant petitioner's petition for writ of certiorari for the reasons hereinafter assigned.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1254.

STATEMENT OF THE CASE.

Respondent respectfully excepts to petitioner's argumentative and colored Statement on pages 3 to 7 of his petition. Respondent here adopts and submits the Statement as set forth by the Circuit Court of Appeals for the Sixth Circuit (See pages 34 to 43 of Appendix to petition for writ of certiorari).

QUESTIONS PRESENTED.

The questions presented in the petition do not merit serious consideration by this Court, or an extended brief by respondent, but in order to be of as much help as possible to this Court, such questions will be discussed briefly in the appendix hereto.

CONCLUSION.

For the reasons set forth herein, the petition for writ of certiorari should be refused and denied.

Respectfully submitted,

ROBERT M. MURRAY,
1000 Temple Building,
Kansas City, Missouri,
and
JAMES T. HAYNES,
Union Planters National Bank Building,
Memphis, Tennessee,
Attorneys for Respondent.

PROOF OF SERVICE.

I, Robert M. Murray, one of the attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of July, 1957, I served copies of the foregoing Reply to petitioner's petition for writ of certiorari on petitioner, by mailing copies thereof in duly addressed envelope with adequate pre-paid postage, to his attorneys of record, as follows:

Bailey Brown,
George J. Schweizer, Jr.,
John S. Porter,
and
Burch, Porter, Johnson and Brown,
128 North Court Avenue,
Memphis, Tenn.

Robert M. Murray

ROBERT M. MURRAY.

POINT No. 1.

Under point No. 1 petitioner questions the authority of the Circuit Court of Appeals to set aside a jury verdict for inadequacy "where there is no error of law, all facts in support of the verdict being disputed, and the District Judge in the exercise of his discretion having approved the verdict."

As there is no basis in fact in the case to support such a question, it does not deserve or require any consideration on the part of this Court. The question incorporates three statements of fact, or conclusions of petitioner, when none of such facts or conclusions exist. On the contrary, there was an error of law committed by the jury in failing to do its duty to follow the instructions of the Court and allowing Respondent the amount of undisputed actual damage shown in the evidence and which the jury was duty bound to give him if they found in his favor on the question of liability. There was another error of law committed by the trial court in refusing to set aside the verdict of the jury and the judgment of the Court on Respondent's motion for a new trial and to grant Respondent a new trial, where the evidence showed a specific amount of actual damage which was not disputed. All of the facts supporting the verdict were not disputed, but on the contrary, the amount of actual damage was not disputed and petitioner did not contend otherwise either in the District Court or the Circuit Court of Appeals. The District Judge did not approve the verdict by the exercise of his discretion, as he had no discretion under the circumstance in the case and it was his duty to set aside the verdict and judgment for compensatory damages and order a new trial on that issue, and the Appellate Courts have so held.

As stated in the majority opinion of the Court of Appeals (page 40 of petition for writ of certiorari), the Circuit Court of Appeals for the Sixth Circuit, in the case of *Reisberg* v. *Walters*, 111 F. 2d 595, held that the award of a jury in a personal injury case arising out of an automobile accident was grossly inadequate if it failed to consider essential elements of damages in an amount conceded to have been suffered, and demonstrated that the jury had failed to abide by the instructions of the Court. The Court of Appeals further stated that "the Reisberg decision reaffirmed the doctrine of *Pugh* v. *Bluff City Excursion Company*, 177 Fed. 399, 401 (C. A. 6), which held that in case of inadequacy of verdict, such as here presented, it was error of law to overrule the motion for new trial." In this case Judge Learned Hand, speaking for the Court, declared that, while Courts will rarely review a reward for damages, orders refusing new trials because of the amount of the verdict have been reversed in cases where the jury did not attempt to appraise the plaintiff's loss at all and where the verdict was less than the amount of undisputed loss. *C. F. Spero-Nelson* v. *Brown*, 175 F. 2d 86 (C. A. 6), in which the doctrine of the *Reisberg* case, *supra*, was specifically approved.

POINT No. 2.

Under this point petitioner asks a question based upon a premise which does not exist. He asks whether a Federal Appellate Court may set aside a jury verdict and judgment for inadequacy of compensatory damages and reverse for the assessment of compensatory damages only and affirm the same verdict and judgment "where the verdict was entire, was based upon conflicting evidence, was not affected by any error of law, and a motion for new trial was overruled by the trial court."

There is no basis in the case for such a question and it merits no consideration of this Court as (1) the verdict

was not entire. It consisted of three separate verdicts, one on liability, one on compensatory damages and one on punitive damages. (2) The verdicts as to liability and punitive damages were based upon conflicting evidence, but the verdict as to compensatory damages was not based upon conflicting evidence, but upon positive and uncontradicted evidence. (3) The verdict and judgment were affected by an error of law by the trial court refusing to set the judgment aside and grant respondent a new trial on the issue of compensatory damages and an error of law was committed by the jury in failing in its duty to award respondent at least the amount of undisputed actual damages shown by the evidence. (4) A motion for new trial was overruled by the District Judge when it was his positive duty to grant a new trial.

The Circuit Court of Appeals, in the majority opinion (see page 41 of petition for writ of certiorari), made the following statement:

> "While there was controversy as to defendant's liability, there was no controversy as to the necessity of plaintiff's incurring the expenses listed, nor as to the fact that they were actually incurred. The award of $500.00 was around 1/40th of the actual and specific damages proved and nothing was allowed for the undisputed injury shown to have been suffered by plaintiff in his professional reputation, standing and loss of practice.
>
> "While in general the granting of a new trial is a matter of discretion with the Court, it is not so when the verdict is inconsistent on its face. *Pugh v. Bluff City Excursion Company, supra.* The jury found plaintiff was entitled to recover. In view of the undisputed evidence as to the expense caused by the wrongful prosecution it is evident that the jury did not comply with the instructions of the Court.

"As to punitive damages, the award is peculiarly within the discretion of the jury. We cannot say that the discretion was abused, and we do not set aside the verdict of $1.00. * * *."

POINT No. 3.

Under this Point Petitioner asks a question of law which has no application to the case at bar, namely, "May a Federal Court set aside a verdict and judgment for compensatory damages because of inadequacy alone, where applicable State law authorizes the jury to mitigate the damages in accordance with the facts and circumstances of the case?"

There was no such question in the case at bar as the mitigation of damages. No instruction was asked or given on the question of mitigation of damages and no complaint made by Petitioner as to the Court's instructions. No evidence was offered by Petitioner which would justify any mitigation of damages, even if the jury had a right to mitigate the damages. In fact, the petitioner did not even testify in the case.

The cases cited by Petitioner in support of this point and the quotations therefrom set out in the petition, clearly show that they were cases in which the amount or extent of damages could not be exactly calculated, or cases in which the Court failed to properly instruct the jury. In none of those cases was there a verdict for an amount less than the amount of undisputed actual damage proved.

The cases cited and quoted from by the Circuit Court of Appeals in the majority opinion in the case at bar plainly show that the doctrine of mitigation of damages has no place in the case at bar and that the latest cases on the subject in Tennessee and the Circuit Court of Ap-

peals for the Sixth Circuit hold that the jury did not comply with the instructions of the Court and therefore the verdict and judgment must be set aside, so as to correct the finding as to compensatory damages.

POINT No. 4.

Under this point Petitioner seeks to have the question of whether an indictment is conclusive evidence of probable cause further reviewed by this Court, as though the petition were an original appeal. That question was raised in the trial court and the District Judge declared the law to be that in Tennessee and in the Sixth Circuit that evidence of an indictment is merely *prima facie* evidence of probable cause and that in view of the evidence in the case at bar which rebutted the *prima facie* presumption, the matter was for the jury to pass upon. The Circuit Court of Appeals expressly affirmed that finding and cited cases in support of the ruling. In order to try to by-pass that situation Petitioner contends that there was no evidence to rebut the *prima facie* presumption of probable cause and that the Circuit Court of Appeals merely "inferred from evidence of malice that there was an absence of probable cause." He then cites cases holding that malice, alone, is insufficient to show probable cause and that want of probable cause cannot be inferred from malice and then contends there is a conflict in the decisions of the Courts of Appeal on that question. The majority opinion of the Court of Appeals set out in the petition at pages 38 and 39, clearly shows that the Court of Appeals did not merely infer from evidence of malice that there was a lack of probable cause. The Court sets out the facts upon which its finding was based and states that the evidence of such facts was not contradicted. A portion of the statement contained in the opinion is as follows:

"Since defendant for a considerable period as shown by the uncontradicted testimony, accepted the activities of plaintiff and Snakard in Padre's affairs without any claim of fraud and later extorted from Snakard and plaintiff practically their entire interest by threats of prosecution, the inference of good faith and probable cause arising from the indictment was rebutted. The question whether defendant acted in good faith in pressing the indictment in 1954, so long after the civil liability of plaintiff, if any, at least in large degree, had been settled, became a question of fact. Under Tennessee law defendant's failure to testify in the malicious prosecution case warranted an inference of bad faith and want of probable cause. *Bankhead* v. *Hall*, 238 S. W. 2d 522, 527, 34 Tenn. App. 412. The District Court did not err in submitting this issue to the jury."

It therefore appears that even if there were a conflict of decisions of the Courts of Appeal on the question of whether a lack of probable cause can be inferred from evidence of malice, alone, it has no application to the case at bar.

CONCLUSION.

Respondent respectfully states that he cannot improve upon the statement of facts contained in the majority opinion of the Circuit Court of Appeals or furnish this Court with any later or clearer cases in support of the findings of that Court, than set out in said opinion and therefore he has not engaged in any lengthy discussion of either the facts or the law in the case so as to lighten the burdens of this Court as far as possible.

Respectfully submitted,

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